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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES,
PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, AND THE CURATORS OF THE UNIVERSITY OF MISSOURI,
RESPONDENTS.

RESPONDENTS' SUPPLEMENTAL BRIEF.

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INDEX

Table of Cases Cited

Statutes Cited

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RESPONDENTS' SUPPLEMENTAL BRIEF.

Petitioner has elected to stand upon the brief filed in support of his petition for certiorari. Respondents stand upon their brief filed in opposition to the granting of the writ. Respondents also file and respectfully submit this supplemental brief.

Petitioner, having refused to apply to the board of curators of Lincoln University for a legal education, is in no position to contend that that board would not have furnished him the legal education provided by the Lincoln University Act.

In our former brief (pages 34-38) we show that under the Lincoln University Act (Secs. 9616-9624, R. S. Mo.,

1929) it is the mandatory duty of the board of curators of Lincoln University, upon petitioner's application, (a) to establish a school of law in Lincoln University equal to that in the University of Missouri, and to admit petitioner as a student therein; and (b) pending the establishment of such school of law, and as a temporary matter, to arrange for the attendance of petitioner in one or another of the schools of law already established in the universities of Kansas, Nebraska, Iowa or Illinois (all of which admit negroes), and to pay his tuition fees while he is attending such school.

At pages 60-61 of our former brief we refer to the evidence showing that petitioner refused to avail himself of these provisions made by the state for his benefit (Rec. 74, 82, 83, 84, 85-86, 218-219, 222).

The evidence shows without dispute that if petitioner had requested the Lincoln University curators to furnish him facilities for education in the law, it would have been entirely feasible for the board to have established a school of law in that institution. On that point petitioner's witness, Dean W. E. Masterson, testified (Rec. 184-187):

> "Q. Dean, in the light of the examination of Dr. Elliff about the establishment of a law school at Lincoln University—I want to ask you, as an educator and as dean of the law school here what, in practical effect, would have to be done to set up a law school at Lincoln University for the instruction in law of one or two students. Just tell us what you would do if you were setting out to do that.
>
> A. You must first have a library, of course. I understand they have that. Second, you would have a place for meeting the student and reciting with him. I understand they have that. Then, of course, you must have competent instruction to teach a full year curriculum. That would require, I should say, two teachers of law. That would give them just about the amount of law that the individual instructor on the faculty here has at this university.

Q. Now at what expense could a law school be established in Lincoln University for the instruction in law of one or two students, to give them such law school and standard of training equal to that in the Missouri University Law School?

A. Since you have the library there and the buildings—about the only item of expense would be the salaries of those two instructors.

Q. What would that be, to get men of equal grade with what you have in Missouri University?

A. I should say that you could get very excellent teachers of law varying from $3,500.00 to $5,000.00 a year.

Q. Assuming the top figure, could you establish a law school in Lincoln University for the instruction of one or two students and on a level of scholarship and training equal to that in Missouri University for a maximum of $10,000.00 a year?

A. I think so.

Q. If, on the other hand, a negro were admitted into the Law School of the University of Missouri, and educated in a separate class in accordance with the public policy of the state, would not that expense to the State of Missouri, to supply separate instruction in the Missouri University Law School be as great as it would to establish it in Lincoln University?

A. It would, because our present teaching staff already have full classes. If we gave additional instruction, in separate classes, it would require two extra teachers.

Q. If there was a demand made upon Lincoln University board of curators to establish a law school in Lincoln for one or two men students, and capable men of the kind you have been talking about would be employed to instruct that one or two students, would they not, having the entire time and attention of their instructors, receive at least as adequate instruction, if not better—

A. They would receive—

Q. Than if they were members of a class of forty students?

A. They would receive much better instruction.

Q. In the ordinary routine of instructing a class of forty students or thirty to fifty students, a student, in the nature of things, cannot recite often, can he?

A. He cannot.

Q. But with one or two students having the attention of the instructor, he would be practically having a private tutor?

A. He would.

Q. Is that of value to a student?

A. Of great value."

The evidence also shows without dispute that Lincoln University had ample funds with which to establish a school of law (Rec. 147, and see Laws, Mo., 1935, p. 56).

The law presumes that if petitioner should apply to the board of curators of Lincoln University for a legal education, that board would perform its legal duty to establish a school of law in that institution equal to the one in the University of Missouri. This is but the application of the general principle that the law presumes that a public officer charged with the performance of a certain duty will perform that duty. And even in those cases where the performance of the duty involves the exercise of some discretion, *the law presumes that the officer will properly exercise such discretion.* In *Hall* v. *Geiger-Jones Company,* 242 U. S. 539, 554, this court said:

> *"The discretion of the commissioner is qualified by his duty,* and besides, as we have seen, the statute gives judicial review of his action. Pending such review we must accord to the commissioner *a proper sense of duty* and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (*Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 545); * * *". (Italics ours).

In *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394, 398, this court said:

"Plaintiff in error puts some stress upon the absence of rules by the board, urging that the statute is in conflict with the Constitution of the United States because it purports to authorize the revocation of a certificate 'without defining or determining in advance what grounds or facts or acts shall be sufficient cause for such revocation.' Such absence permits, it is asserted, arbitrary action. *We cannot yield to that assertion or assume that the board will be impelled to action by other than a sense of duty* or render judgment except upon convincing evidence introduced in a regular way with opportunity of rebuttal. We certainly cannot restrain the board upon the possibility of contrary action. Official bodies would be of no use as instruments of government if they could be prevented from action by the supposition of wrongful action."*

In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 190, this court said:

"It is said that the commissioner, who administers the act, has not provided for these deductions or the means for determining them. But the commissioner must administer the act as it is construed, and it is not to be supposed that he will not now *properly* do so."

In *Dalton Adding Machine Co.* v. *State Corporation Commission of Virginia*, 236 U. S. 699, 701, this court said:

"The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank of Albuquerque* v. *Albright*, 208 U. S. 548, 553."

In *Plymouth Coal Co.* v. *Commonwealth of Pennsylvania*, 232 U. S. 531, 545, this court said:

"It is to be presumed, until the contrary appears, that the administrative body would have acted *with*

*All italics in all quotations in this brief are ours.

> *reasonable regard* to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562; *Bradley* v. *Richmond*, 227 U. S. 477, 483."

In *Bradley* v. *Richmond*, 227 U. S. 477, 483, this court said:

> "But it is said that after all there is no security that the city council will not in the end approve of a scheme of classification operating most unjustly. The same objection might be made with reference to any tribunal required to determine such a matter. *The presumptions which must be indulged run counter to the suggestion made.*"

Petitioner is in no position to contend that, if he had applied, the curators of Lincoln University would not have furnished him the legal education provided by the Lincoln University Act. And petitioner is in no position to contend for the right to admission in the University of Missouri, if the legal education available to him (*either* in a law school in Lincoln University equal to the law school in the University of Missouri, *or* in a law school in an adjacent state university) afforded him opportunity for a legal education substantially equal to that provided for white citizens of the state. This is true because it is to be presumed that the Lincoln University curators would have afforded him the *fullest rights to which the Lincoln University Act entitled him.* For these reasons the question of the constitutionality of the provision for out-of-state instruction is not presented for review. This because, petitioner never having made any application to Lincoln University for a legal education in that institution, it is entirely impossible to know whether the curators of that institution, had he applied, would have immediately established a law course there, equal to the one in the University of Missouri, and thereby have ren-

dered it unnecessary for petitioner to go out of the state for a legal education.

In the effort to avoid the effect of his refusal to apply to Lincoln University, petitioner in effect asks this court to assume that if he had so applied his application would have been rejected. In the first place, there is absolutely no evidence upon which to base any such assumption. In the second place, petitioner's position is directly in conflict with the presumption that the Lincoln University board would have properly and justly performed its duty. In the third place, petitioner's contention is in conflict with the rule that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted.

In *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, 58 Sup. Ct. Rep. 459, 463, this court said:

> "The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the district court has jurisdiction to enjoin the holding of a hearing by the board. So to hold would, as the government insists, in effect substitute the district court for the board as the tribunal to hear and determine what Congress declared the board exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that *no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.*"

In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-617, this court said:

> "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. *He should apply and see what happens.*"

In *Petroleum Exploration, Inc.*, v. *Public Service Commission*, 304 U. S. 209, 222-3, 58 Sup. Ct. Rep. 834, 841, this court said:

> "By the process of injunction the federal courts are asked to stop, at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. *'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting colore officii in a conscientious endeavor to fulfill their duty to the state.'*"

In *Bourjois, Inc.*, v. *Chapman*, 301 U. S. 183, 188, the complainant sought to enjoin enforcement of an act regulating cosmetics, which act required registration of cosmetics and gave a board power to refuse certificates to preparations containing harmful ingredients. In its opinion this court said:

> "The plaintiff contends that in other respects the statute violates rights protected by the Fourteenth Amendment and the Constitution of the State. It objects that the power conferred upon the board to grant or deny a certificate is unlimited; that the board has issued no regulations; and that neither the statute nor the board has provided for hearing an applicant. The plaintiff has not applied for a certificate; *and it is not to be assumed that, if it concludes to do so, its application will be refused, or that the board will deny any right to which it is entitled.*"

In *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309, the complainant brought suit to enjoin the Illinois Commerce Commission from enforcing an order by which the gas

company was required to open its books to the commission and furnish certain statistical data for use in a proceeding pending against it. The gas company contended that the commission would arbitrarily make use of the data in fixing the company's rates. In dealing with that contention, this court said:

> "It will be time enough to challenge such action of the commission when it is taken or at least threatened, *First National Bank* v. *Albright*, 208 U. S. 548; *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, and to consider whether appellant has standing to make the challenge."

In *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123, Goldsmith, a certified public accountant, brought suit for mandamus against the Board of Tax Appeals, to compel the board to enroll him as an attorney with the right to practice before it. The board set up grounds for its refusal to admit him to practice before it. In affirming the refusal of mandamus, this court said:

> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. *Until he had sought a hearing from the board, and been denied it he could not appeal to the courts for any remedy and certainly not for mandamus to compel enrollment.*"

In *Gundling* v. *Chicago*, 177 U. S. 183, 186, the plaintiff in error was convicted in a police court for violation of an ordinance of Chicago forbidding the sale of cigarettes without a license. He challenged the constitutionality of the ordinance, on the ground that it granted arbitrary

power to the mayor to grant or refuse a license thereunder. This court said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license."

In *Smith* v. *Cahoon*, 283 U. S. 553, 561-2, the appellant, a private carrier for hire, was arrested upon a warrant charging him with operating vehicles upon the highways of Florida without a certificate of public convenience and necessity. The appellant challenged the validity of the statute requiring such a certificate. In the course of its opinion this court said:

> "From statements made at the bar, it would appear that the appellant was engaged in the business above mentioned when the act was passed and hence that he would be entitled to a certificate, provided he complied fully with the provisions of the act. By the terms of the act such compliance would be necessary. The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, *is not at liberty to complain because of his anticipation of improper or invalid action in administration.*"

See, also, *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468, 471; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 55-6; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562; *Ex Parte Virginia Commissioners*, 112 U. S. 177.

It is respectfully submitted that petitioner, having wholly disregarded and refused to avail himself of the facilities provided by the State for his benefit, is in no position to have the relief he seeks.

Respectfully submitted,

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